STATE OF MICHIGAN

IN THE SUPREME COURT

FRASER TREBILCOCK DAVIS & DUNLAP. P.C.

Plaintiff-Appellee

Case No. 148931

V

Court of Appeals Docket No. 302835, 305149, and 3007002

BOYCE TRUST 2350, BOYCE TRUST 3649, and BOYCE TRUST 3650

Midland County Circuit Court No. 09-006135-CZ

Defendant- Appellant

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DEFENDANT-APPELLANTS' REPLY BRIEF IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

148931-3
reply

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DEFENDANTS/APPELLANTS' REPLY BRIEF

Introduction and Case Status

Defendant/Appellant timely filed an application for leave to appeal. On or about April 7, 2014, Plaintiff/Appellee timely filed its response to the Defendants' application. This reply brief is being submitted pursuant to MCR 7.302(E) and MCR 7.212(G). As provided in the Court rule, this brief is limited to addressing the arguments made by Plaintiff.

Argument

I. The Plain Language of the Court Rule does not support the Plaintiff's position

Plaintiff argues that the plain language of MCR 2.403 supports the award of case evaluation sanctions to a law firm because there is no specific exclusion for an incorporated law firm.[1] This argument is faulty in two regards. First, the text of the Court rule limits the Plaintiff recovery to "actual costs." This plain language supports the Defendants' position that there can be no case evaluation sanctions where a law firm fails to incur any attorney fees.

Second, Plaintiff's argument was rejected by this Court in *Haliw v. City of Sterling Heights*, 471 Mich. 700, 707, 691 N.W.2d 753, 757 (2005). There, this Court held that the relevant inquiry is whether the statute "expressly authorizes" fees rather than whether the statute "expressly excludes" such fees. Thus, the fact that the court rule contains no express exclusion is of no consequence - - Plaintiff bears the burden to prove that it is entitled to fees, Defendants do not have the burden to prove that Plaintiff is not entitled to fees.

II. General Corporate Law Principles are not Relevant to the Court's Determination

Plaintiff takes great pains to emphasize that it is an incorporated entity and, in Plaintiff's

[1] See page 8 of Plaintiff's brief.

view, subject to special status because of its corporate structure. Defendants submit this is a red herring argument. Defendants have never disputed general corporate law which establishes that a corporation is a legal entity completely distinct from its shareholders.

Defendants agree that the corporate entity was the party plaintiff in this matter and that the individual attorneys were not parties. However, the Plaintiff entity cannot act except through its employees and agents. Therefore, the relevant point is that the entity was in fact acting on its own behalf in prosecuting the action. The corporate entity represented itself and the individual attorneys acted only in their capacity as individual employees of the corporate entity.

III. Plaintiff's foreign case law is inapplicable and/or unpersuasive

Several of the cases cited by the Plaintiff in support of its response can be readily distinguished. First, Plaintiff cites the Hawaii case of *Hall v Laroi*, 238 P3d 714 (Hawaii App 2010). The decision in that case relied upon an earlier case whereby an individual attorney (not incorporated) was found to be entitled to attorney fees under a specific state statute. The Court found "no relevant distinction" between whether an action was brought by an individual attorney or an incorporated entity. *Hall* at 719. Accordingly, the *Hall* decision actually supports the Defendants' position.

Second, the Court in *Mikaell v Gallup*, 2006 WL 2141177 (Ohio App 2006), the Court emphasized that the individual attorney was entitled to sanctions due to a frivolous action because the Court found that he was entitled to charge his client and his firm for fees if he so decided. This is readily distinguished from the Plaintiff's case as it admits that the individual employee attorneys were not entitled to charge their individual attorney fees to the Plaintiff law firm.

Third, Plaintiff cites the New Jersey cases in support of its claim. However, later cases from New Jersey, including *Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, 410 N.J. Super. 510, 546-47, 983 A.2d 604, 625 (App. Div. 2009)[2] shows that the law of New Jersey as it has more recently developed is actually in line with Defendants' position.

Fourth, Plaintiff cites the Texas case of *Pullman v. Brill, Brooks, Powell & Yount*, 766 S.W.2d 527, 530 supplemented, 763 S.W.2d 505 (Tex. App. 1988). There, the Court emphasized that the Plaintiff law firm had dissolved shortly after suit was filed and the representation was actually completed by a different entity.

Fifth, Plaintiff cites several federal court of appeals cases which apply the *Kay*[3] footnote and extrapolate it to other federal statutes and adopt a rule that an incorporated law firm is never a pro per plaintiff. Defendant recognizes this law exists. However, none of these cases apply Michigan law. Further, Defendants submit that the wholesale acceptance of a law firm as never being a pro-per organization will fundamentally change Michigan law and provide lawyers and law firms with immense advantages over other entities and citizens.

As an example, contractual attorney fee provisions in legal services contracts would allow law firms to effectively create additional billings and fee revenue by suing clients. If a law firm is never a pro per party, then there is no basis for denying a law firm contractual attorney fees, even though they incur no fees to anyone other than themselves. This creates a tremendous advantage that no other corporation or other non-legal services entity has and will anoint law firms as a special privileged and favored business entity under Michigan law.

Defendants submit that the wholesale adoption of a law firm as never being a pro per plaintiff, which is the legal standard accepted by the cases applying the *Kay* footnote, would

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2 Quoted in detail in the Defendants' primary brief

3 Kay v. Ehrler, 499 U.S. 432, 436, 111 S. Ct. 1435, 1437, 113 L. Ed. 2d 486 (1991)

have a wide and everlasting impact on Michigan law and would be contrary to a vast body of existing precedent. Defendants submit that this Court should disavow the *Kay* footnote cases in their entirety as not applicable to Michigan law.

Conclusion

For the reasons stated above and in the Defendants' initial application, Defendants request that this Court grant the application for leave to appeal and further reverse the majority Court of Appeals determination that the Plaintiff law firm is entitled to case evaluation sanctions.

Dated: April 25, 2014

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